IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 510 of 1995
with
CRIMINAL APPEAL No 623 of 1995

For Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT
and
Hon'ble MR.JUSTICE A.L.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOVINDBHAI ISHVARBHAI RATHOD
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 510 of 1995
MR PM VYAS for the Appellants.
MR PR ABICHANDANI, APP, for the Respondent.
2. Criminal Appeal No. 623 of 1995
MR PM VYAS for the Petitioner.
MR PR ABICHANDANI, APP, for the Respondent.

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT
and
MR.JUSTICE A.L.DAVE

Date of decision: 01/08/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. These two Criminal Appeals arise out of a judgment and order rendered by the learned Additional Sessions Judge, Bharuch, on 29th April, 1995, in Sessions Case No.213 of 1994, recording convictions under Section 302 read with Section 34 of the Indian Penal Code, Section 323 read with Section 34 of I.P.C. and Section 504 of I.P.C. in respect of the appellants, who were accused persons before the Sessions Court. Appellants No.1, 2 and 3 in Criminal Appeal No.510 of 1995 were accused No.1, 2 and 3, respectively, before the Trial Court and the appellant in Criminal Appdeal No.623 of 1995 was accused No.4 before the Sessions Court. The accused persons were sentenced to undergo imprisonment for life and to pay a fine of Rs.100/-, in default, to undergo rigorous imprisonment for three months for the offence punishable under Section 302 read with Section 34 of I.P.C.. The were sentenced to undergo simple imprisonment for 15 days and to pay a fine of Rs.100/-, in default, to undergo rigorous imprisonment for seven days for the offence punishable under Section 323 read with Section 34 of I.P.C. and were ordered to undergo rigorous improsonment for 15 days and to pay a fine of Rs.100/-, in default, to undergo rigorous imprisonment for seven days for the offence punishable under Section 504 of I.P.C.

2. The facts of the case, in brief, are as follows:-

2.1 The appellants are residents of Village Luvara, Taluka Vagara of Bharuch district. On 23rd January, 1994 , at about 10.00 A.M., there was a quarrel regarding discharge of drain water between the accused persons and one Niruben Bhailalbhai and, during that quarrel, the accused persons caused injury to Niruben and Jayaben and used abusive language. It is also the case against the appellants that, around that time, deceased-Dabhai Somabhai Rathod and his son-Bhikhabhai Dabhai came there and inquired as to what was happening and, on that, the accused persons ran after them. Bhikhabhai Dabhai and the deceased started running and Bhikhabhai Dabhai took shelter behind a tree, whereas deceased-Dabhai was assulted by the accused persons. It is the case of the prosecution that accused No.1 was armed with bow and arrow, accused Nos. 2 and 3 were armed with spears and accused No.4 was armed with an axe. As per the prosecution case, accused No.2, firstly, gave a spear blow on the right side of neck of the deceased, as a result of which he fell down and, thereafter, accused No.1 and 3 caused injuries. Ultimately, Dabhai succumbed

to the injuries. The dead body was then dragged away by the accused. Bhikhabhai Dabhai, therefore, approached the Vagara Police and lodged a First Information Report on 23rd January, 1994, on the basis of which an offence was registered by Vagara Police vide C.R. No.8 of 1994. Upon investigation, it was found that there was evidence to connect the accused persons with the offence and, therefore, a charge sheet was filed against them. The learned Magistrate found that the case was triable exclusively by a Court of Sessions and, therefore, committed the case to the Court of Sessions and Sessions Case No.213 of 1994 came to be registered.

2.2 Upon trial, the learned Additional Sessions Judge found that the prosecution could establish the guilt of the accused persons and convicted all the four accused persons, as stated above.

3. Learned Advocate, Mr. P.M. Vyas, for the appellant has taken us through the record and proceedings and submitted that the evidence led by the prosecution is inconsistent, contradictory and doubtful. He submitted that the Trial Court has committed an error in appreciating the evidence.

3.1 Mr. Vyas submitted that the medical evidence is inconsistent with the occular evidence. There is no evidence to indicate any injury with axe. The story otherwise is unbelievable because the eye-witness-Bhikha Dabhai has not even tried to intervene in the assault. No son would be a silent spectator to such a deadly attack on his father. Mr. Vyas submitted that the appeals, therefore, may be accepted.

4. Learned Additional Public Prosecutor, Mr. Abichandani, has opposed these appeals. He has drawn attention of this Court to the medical evidence in the form of post-mortem notes as well as deposition of the doctor and has, then, taken us through deposition of Bhikha Dabhai (Ex.16), the eye-witness as well as other evidence in the form of Ambubhai Somabhai (Ex.27) and Madhuben Dabhai (Ex.28) to emphasis and show that the evidence is cogent, strong and direct to establish the guilt of the accused persons.

5. We have gone through the record and proceedings and have examined the same in light of the contentions raised before us and from the angles suggested by the respective parties.

6. The material witness is Bhikhabhai Dabhai

(Ex.16), who is the eye-witness to the incident. He, in his deposition, says that when he and his father had gone near the place of incident, they found that accused No.1-Govind Ishwar had bow and arrow with him, whereas accused Nos.2 and 3, namely, Karshan Govind and Shantu Govind, had spears with them and accused No.4-Natwar Govind had axe with him. He says that, on seeing them, accused No.2 cajoled them and, therefore, they started running. However, the four accused persons chased them. His father could not run much and, therefore, the accused persons gheraoed him, while the witness took shelter behind a hedge. He saw that accused No.2 gave a spear blow on his father, as a result of which, his father fell down bleeding. Accused No.3 also gave a spear blow on head of the deceased, whereas accused No.1 caused injuries with bow and arrow in the stomach, as a result of which, his father died. The accused persons dragged the dead body to their house. He says that Ghemal Vaghar, Sadubhai Dhula, Dhulu Puja and Mansang Laxman were present. The cause for dispute was discharge of drain water. The witness has been cross-examined at length, but sticks to his version in examination-in-chief. His deposition is consistent with his complaint.

6.1 Another important witness is Ambubhai Somabhai (Ex.27). He went to the place of incident on hearing about the same. He noticed the dead body of his brother. He also noticed accused No.1 standing with bow and arrow, accused Nos.2 and 3 standing with spears in their hands and accused No.4 with an axe in his hand. He also saw that the accused persons dragged the dead body of Dabhai towards their house. He also has been cross-examined. He denies the suggestion that he was informed later on that Dabhai has been killed. He denies the suggestion that he has falsely implicated the accused persons. The cross-examination does not reveal anything to damage the prosecution case or to help the defence case, in any manner.

6.2 Widow of the deceased-Madhuben has been examined at Ex.28. She says that while she was at home, she heard about the incident and went to the spot. At that place, accused No.1-Govind Ishwar and accused No.2-Karshan Govind gaver her abuses and told her that they have murdered her husband and the would do away with her as well. She then says that accused-Govind Ishwar and Karshan Govind had spears with them. During cross-examination, she asserts that she had stated before

the Police in her statement that Govind and Karshan had told her that they have murdered her husband and that they would do away with her as well.

6.3 The medical evidence is at Ex.31, in form of deposition of Dr. Nareshbhai H. Gadhvi. He says that, he noticed one cut lacerated wound on neck right clavical. He noticed one stab wound on 5th intercostal space, one stab wound on left half of sternal bone, another stab wound on left lower costal margin, another stab wound on right lumber region and 4 abrasions. The cause of death was vascular shock due to cutting of major vessels due to cut wound on the right supraclavicular region. He says that the injuries were possible with muddamal spear and arrow.

7. If the above evidence is examined, apart from other pieces of evidence, it is amply clear that the Trial Court was right in recording convictions so far as accused Nos.1, 2 and 3 were concerned. Eye-witness Bhikha Dabhai involves accused Nos.1, 2 and 3 in the complaint as well as in his deposition. He does not involve accused No.4 in any manner. The medical evidence also does not speak of any injury caused with axe. Witness-Madhuben Dabhai or Ambubhai Somabhai also do not attribute any overt act on part of accused No.4 whereas they, in terms, involve accused Nos. 1, 2 and 3.

7.1 In fact, deposition of Madhuben Dabhai (Ex.28) clearly states that accused Nos.1 and 2 told her that they have murdered her husband and they would do away with her as well. She has been cross-examined, but she asserts her version and she states that she had stated so even before the police. The Investigating Officer-Udaysing B. Dabhi has been examined at Ex.41. During cross-examination by the defence, other contradiction is proved, but this aspect is not suggested, meaning thereby that the assertion made by Madhuben that she had stated before the police that accused Nos.1 and 2 told her that they had murdered her husband and they would do away with her as well is not indicated to be an improvement, falsehood or embroidary. Differently put, she has been consistent in her version from the beginning, i.e. soon after the incident, on this aspect

7.2 The medical evidence also indicates injuries on person of Jayaben as well as Niruben. Their medical certificates are at Ex.34 and 35, respectively, which indicate simple injuries in form of tenderness, bruises and lacerations. They have also deposed to that effect.

7.3 The witnesses also deposed about abusive language having been used by the accused persons at the time of the incident. These aspects have gone unchallenged.

8. The outcome of the above discussion is that, the prosecution can be said to have successfully established the guilt of accused Nos.1, 2 and 3 in the offence. They have actively participated in the incident causing death of deceased-Dabhai. The medical evidence indicates that the injury was sufficient in ordinary course of nature to cause death. Accused Nos.1, 2, and were armed with deadly weapons with which they have assaulted an unarmed person in a collective and concerted manner. Section 34 of I.P.C. would, therefore, be attracted. Their involvement also includes causing injury to witnesses-Niruben and Jayaben and giving abuses and, therefore, the Trial Court can be said to have rightly recorded their conviction. Their appeal being Criminal Appeal No.510 of 1995, therefore, merits dismissal. There is no reason to reject the evidence of Bhikha Dabhai and Madhuben Dabhai. Their version is supported by evidence of other witnesses like Ambubhai, Badhar, Neeruben and Jayaben.

9. So far as accused No.4-appellant in Criminal Appeal No.623 of 1995 is concerned, the complainant neither in his complaint nor in his deposition nor other witnesses in their depositions attribute any overt act on his part. The medical evidence also indicates total absence of any injury with axe. His involvement in the incident, therefore, cannot be said to have been successfully established except for the fact that he was present at the place of incident with an axe in his hand, which aspect is reflected in deposition of Madhuben Dabhai. Merely because he was present with an axe with other accused persons cannot be taken to indicate that he shared common intention of killing Dabhai with other persons, more so, when the victim went to the place coincidentally. The common intention is not possible to be read from the conduct attributed to the accused No.4 either. In our opinion, therefore, his conviction cannot be sustained. His appeal deserves allowance.

10. In view of the above discussion, Criminal Appeal No.623 of 1995 is allowed. The conviction and sentence of the appellant-Natwar Govind recorded by the Trial Court is hereby set aside. The appellant be set at liberty forthwith, if not required in any other case.

10.1 Criminal Appeal No.510 of 1995 is dismissed. The

conviction and sentence of the appellants-accused Nos.1, 2 and 3 recorded by the Trial Court is confirmed.

[J.N. BHATT, ACTG. C.J.]

[A. L. DAVE, J.]

gt